Supreme Court of the United States

October Term, 1943

No. .....

ORANGE THEATRE CORPORATION,
a corporation,

Petitioner.

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Emphasis and the like, ours, unless otherwise indicated. Reference "App." refers to Appendix of record in Court below. Reference "Supp. App." refers to Supplemental Appendix.)

I

Opinions of the Court Below

The decision of the Circuit Court of Appeals for the Third Circuit under challenge was filed January 10, 1944, is reported in 139 Fed. 2d 871 and is set forth in full in the Supplemental Appendix pp. 3 to 10.

The opinion of the Circuit Court of Appeals, on the first appeal was filed on August 6, 1942, is reported in 130 Fed. (2d) 185, and is fully set forth in the Appendix pp. 12 to 17.

The first opinion of the District Court is reported in 2 F. R. D. 278 (Walker, *D. J.*), and is fully set forth in the Appendix pp. 7 to 10. The second opinion of the District Court (Fake, *D. J.*), is fully set forth in the Appendix pp. 101-104.

II

Statement of the Case

A full statement of the case has heretofore been given under heading "A" in the petition, and in the interest of brevity the statement will not be repeated in the brief.

III

Specification of Errors

The specification of errors is substantially the same as the reasons of the petition for the allowance of the writ set forth in the petition and may be condensed as follows:

1. The Circuit Court of Appeals for the Third Circuit erred in departing from and refusing to adhere to and enforce its decision and mandate on the first appeal, which became the law of the case. In effect, the Circuit Court of Appeals reversed its former decision after the expiration of the term.

2. The Circuit Court of Appeals erred in holding that under the Rules of Civil Procedure, a defendant may challenge the jurisdiction of the court over his person, after entering a voluntary or general appearance. This is revolutionary and in conflict with the applicable decisions of this Court.

3. The Circuit Court of Appeals erred in holding that the Rules of Civil Procedure abolished the age old distinction between general and special appearances. This ruling is in conflict with the decisions of this Court, and other Circuit Courts of Appeal which have held that the new Rules merely eliminated the labels, but not the substance of such appearances.

4. The Circuit Court of Appeals erred in deciding the second appeal upon the ground of lack of jurisdiction over the person, which ground was not raised or urged by the parties, either before it or the District Court.

5. The Circuit Court of Appeals erred in deciding the second appeal on the ground of lack of jurisdiction over the respondents' persons, since that ground, if any, was waived by the respondents.

6. The Circuit Court of Appeals erred in holding that the respondents, notwithstanding their appearance, could assert the objection of lack of jurisdiction over them, even after their time to answer had expired.

IV

ARGUMENT

POINT I

The Court below erred in departing from and refusing to adhere to and enforce its decision and mandate on the first appeal which became the law of the case. In effect, it reversed its former decision after the expiration of the term.

The record shows that District Judge Fake was in doubt about the construction of the first decision of the Circuit Court of Appeals (App. 27), and asked petitioner's counsel to apply for a Writ of Mandamus to clarify that opinion (App. 27, 37, 62, 79, 82). In dismissing the complaint Judge Fake made an order in the identical language of the first order of dismissal, because he wanted the record to be in the same condition as it was on the first appeal, so that the Circuit Court of Appeals would have precisely the same issue before it (App. 120, 121, 122, 37, 33, 34, 68, 69, 78, 79). Thus the second appeal

was, in essence, an application for a writ of mandamus to enforce its earlier mandate. In such a situation the law gives a litigant a choice of remedy. He may proceed either by mandamus or appeal. The granting of such a writ would have resulted in a vacation of Judge Fake's orders. *Re Potts*, 166 U. S. 263, 41 L. Ed. 994; *Litchfield v. Dubuque & Pacific R. Co.*, 7 Wall. 270, 19 L. Ed. 150; *In re Blake*, 175 U. S. 114, 44 L. Ed. 94.

Now since on the first appeal the Circuit Court of Appeals held that the respondents had lost their objection to venue, and since Judge Fake admittedly misconstrued that reversal and again dismissed on the ground of venue, it was the clear duty of the Circuit Court of Appeals, on the second appeal, to have reversed Judge Fake's orders. Instead, it affirmed him, and thus in effect, repudiated and nullified its first decision. Thus all the time consumed, and all the work and expense invested in prosecuting the first appeal to a successful conclusion, has been rendered nugatory by the refusal of the Circuit Court of Appeals to stand by its earlier decision. In effect, the Circuit Court of Appeals *sua sponte* reversed itself after the expiration of the term, when it had lost jurisdiction over its first decision. *Re National Park Bank of New York*, 256 U. S. 131, 133, 65 L. Ed. 863, 864.

It is settled by a long and consistent line of decisions that whatever propositions of law are decided by an Appellate Court, become the law of the case, and the same Court cannot on a second appeal in the same case, consider new issues or re-examine or reconsider its former decision. The first decision is the law of the case and must control its later decision. This doctrine results from the rule that the decisions of an Appellate Court are conclusive upon the parties, and that the Appellate Court, like a *nisi prius* court, is powerless to revise or review its own judgments after the lapse of a term at which they are rendered, except in a case of fraud. Otherwise litigation would be endless, and judgments would be unstable.

Washington Bridge Company v. *Stewart*, 3 How. (U. S.) 413, 11 L. Ed. 658; *Supervisors* v. *Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Clark* v. *Keith*, 106 U. S. 464, 27 L. Ed. 302; *Sibbald* v. *United States*, 12 Pet. (U. S.) 488, 9 L. Ed. 1167; *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 40 L. Ed. 414; *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451, 42 L. Ed. 539; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 41 L. Ed. 810 at 813. This rule has been recognized by our Third Circuit Court of Appeals in *A. S. Kreider Co.* v. *United States*, 117 Fed. 2d 133, 135 (reversed on other grounds, 313 U. S. 443, 85 L. Ed. 1447), and has been consistently followed by all Circuit Courts of Appeal; *Souer* v. *DeBary*, 105 Fed. 293 (C. C. A., 5th); *Woodruff* v. *Yazoo and M. V. R. Co.*, 222 Fed. 29 (C. C. A., 5th); *Alabama etc. R. Co.* v. *Carroll*, 84 Fed. 772, 777 (C. C. A., 5th); *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 Fed. 2d 891 (C. C. A., 8th); *Balch* v. *Haas*, 73 Fed. 974 (C. C. A., 8th); *Mohrenstecker* v. *Westervelt*, 87 Fed. 157 (C. C. A., 8th); *Thatcher* v. *Gottlieb*, 59 Fed. 872 (C. C. A., 8th); *Mutual Reserve etc. Life Ass'n* v. *Beatty*, 93 Fed. 747 (C. C. A., 9th).

It is respectfully submitted that the action of the Circuit Court of Appeals in the case at bar, is such a serious departure from ordinary appellate procedure as to warrant interference by this Court. In *Bernards* v. *Johnson*, 314 U. S. 19, 86 L. Ed. 11, this Court granted certiorari to review an important question of appellate practice. The case at bar presents a more serious, a more important, and a more far reaching question than was involved in the *Bernards* case, since here the action of the Circuit Court of Appeals strikes at the very foundation of the doctrines of *res adjudicata* and *stare decisis*.

POINT II

The Court below erred in holding that under the Rules of Civil Procedure, a defendant may challenge the jurisdiction of the Court over his person, after entering a voluntary or general appearance. This is revolutionary and in conflict with the applicable decisions of this Court.

The ruling of the Circuit Court of Appeals that the respondents can challenge the jurisdiction of the District Court over their person, after entering a voluntary or general appearance, is revolutionary, and in conflict with the following decisions of this Court: *Pollard* v. *Dwight*, 8 U. S. 421, 2 L. Ed. 666, 669; *Toland* v. *Sprague*, 37 U. S. 300, 330, 9 L. Ed. 1093, 1105; *Kendall* v. *U. S.*, 37 U. S. 524, 623; 9 L. Ed. 1181, 1220; *Jones* v. *Andrews*, 10 Wall. (U. S.) 327, 19 L. Ed. 935; *Shelton* v. *Tiffin*, 6 How. (U. S.) 163, 186, 12 L. Ed. 387, 397; *Creighton* v. *Kerr*, 20 Wall. (U. S.) 8, 12, 22 L. Ed. 309, 310; *Cooper* v. *Reynolds*, 10 Wall. (U. S.) 308, 19 L. Ed. 931, 932; *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26.

It is believed that this is the first case which has squarely held that under the Rules of Civil Procedure an objection to jurisdiction over the person is not waived by a voluntary or general appearance. Unless the question is set at rest by the authoritative decision of this Court, the lower courts will henceforth be beset with interminable litigation over objections to venue, as well as objections to jurisdiction over the person, because the reasoning of the Circuit Court of Appeals also supports the contention that objections to venue are not waived by a voluntary or general appearance. *Cf. Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 87 L. Ed. 1509 with *Bland* v. *Bitker*, 135 Fed. 2d 962 (C. C. A., 7th).

Moreover, the Circuit Court of Appeals overlooked that, in essence, the stipulations between the parties were contracts by the respondents to plead to the merits, and not

to raise any objection to the jurisdiction over the person. Since the Court cites and relies upon *Placek* v. *American Life Ins. Co.,* 288 Fed. 987 (D. Ct., Wash.) as authority for the proposition that the stipulations constitute a voluntary or general appearance, the language of that decision is pertinent to the contractual nature of the stipulations. There the Court said at page 988:

> "It (extension of time) also amounted to an implied agreement with plaintiff that defendant would plead to plaintiff's complaint and reserved no right to attack the process, service of jurisdiction over the person of the defendant. By such action on the part of the defendant, it waived any right to * * * challenge the jurisdiction over aught but the subject matter."

To the same effect see *Brookings State Bank* v. *Federal Reserve Bank,* 291 Fed. 659 (D. Ct., Oreg.).

In *Freeman* v. *Machine Company, supra,* this Court granted certiorari to settle a troublesome question of venue. It is respectfully submitted that the question here presented, viz., whether under the New Rules of Civil Procedure an objection of lack of jurisdiction over the person is waived by a general or voluntary appearance, is equally important.

The two cases cited and relied on by the Circuit Court of Appeals (*Kaufman* v. *United States,* 35 Fed. Supp. 900 (D. C. Dist. Col.); and *Blank* v. *Bitker,* 135 Fed. 2d 962 (C. C. A., 7th)), are distinguishable from the case at bar. The *Kaufman* case was decided by a District Court. Its decision should be disregarded for three reasons. *First,* because its holding that the New Rules of Civil Procedure apply to an action under the Tucker Act, was overruled in *Lynn* v. *United States,* 110 Fed. 2d 586 (C. C. A., 5th) and *United States* v. *Sherwood,* 312 U. S. 584, 85 L. Ed. 1058; *second,* because the questions agitated in this case, and particularly the contractual nature of the stipulations,

were not raised or decided therein. (The opinion in the *Kaufman* case is meager, and does not critically examine the subject); and *third*, because that ruling is contrary to the principles underlying the later decision of this Court in *Freeman* v. *Bee Machine Company, supra.* At most, the opinion in the *Kaufman* is *dicta.*

In *Blank* v. *Bitker, supra,* the defendant's conduct "was within the scope of the procedure outlined in Rule 12 (b)," which in express language states that the defense of lack of jurisdiction over the person and improper venue may be pleaded with other defenses without waiver. For this reason, the Court held that he did not waive his objection to venue. In that case, Bitker did *not* enter a voluntary or general appearance *before* answer. The Court points out that "on the motion the * * * plaintiff's only contention was that the taking of the deposition and answering, constituted a general appearance, and a waiver of the venue defense." 135 Fed. 2d 962. The discussion in the *Bitker* case shows the conflict in the cases and the controversial nature of this question.

It is important to note that the *Bitker* case was decided on June 10, 1943, and that it does not cite or discuss the decision of this Court in the *Freeman* case, *supra,* decided on June 1, 1943. It is apparent that the *Freeman* case was not brought to the attention of the Court in the *Bitker* case.

POINT III

The Court below erred in holding that the Rules of Civil Procedure abolished the age old distinction between general and special appearances. This ruling is in conflict with the decisions of this Court, and other Circuit Courts of Appeal which have held that the new rules merely eliminated the labels, but not the substance of such appearances.

The opinion of the Circuit Court of Appeals reaches the conclusion that a voluntary or general appearance does not waive jurisdiction over the person, by the *rationale* that general and special appearances were abolished by the Rules of Civil Procedure, and that therefore the Rules "call for the use of * * * restraint on the part of the Federal Courts in the exercise of their power over a defendant who has voluntarily appeared to defend an action against him but who desires also to raise a jurisdictional defense" (Supp. App. 8).

This conclusion, we think, is in conflict with the recent decision of this Court in *Freeman* v. *Bee Machine Co., supra* (1943), where this Court recognized the existence of "general appearances", and that an objection to venue may be waived by entering a general appearance.

In our view, all that the Rules of Civil Procedure accomplished was to abolish the "label" of appearances, but it did not abolish the substantive law of general and special appearances. *Jackson* v. *Heiser,* 111 Fed. 2d 310, 312 (C. C. A., 9th). This is recognized by Rule 82, which provides that:

> "These rules shall not be construed to extend or limit the *jurisdiction* of the District Courts of the United States, or the *venue* of actions therein."

In *Melekov* v. *Collins,* 30 Fed. Supp. 159 at 160 (D. Ct. Cal.), the Court said:

> "Rule 82, which is * * * part of the scheme of the modernized procedure in civil actions in the federal

> courts * * * is a definite statement that the long-established and well-settled principles of *substantive rights* of civil litigants remain intact."

At the Cleveland Institute Proceedings (1938, p. 188) Chairman Mitchell of the Advisory Committee, said:

> "Jurisdiction and venue are uneffected. That is stated in Rule 82, but the Rule is surplussage because the *jurisdiction* and *venue* are matters of *substantive law,* and not proper pleading, practice or procedure."

To the same effect see Chairman Mitchell's remarks at Washington, D. C., Institute (1938, p. 231), and *Sibbach* v. *Wilson,* 312 U. S. 1, 85 L. Ed. 479; *U. S.* v. *Sherwood,* 312 U. S. 584, 85 L. Ed. 1058.

During the Cleveland Institute (1938), Chairman Mitchell in answering the question whether a special appearance was required, stated (at p. 242):

> "Now under the new system you do not have to label an appearance as general or special. * * * The Supreme Court has said, that the nature of an appearance depends on the essence of what you are asking for, and not the label you are attaching to it." (Obviously referring to the case of *Davis* v. *Davis,* 305 U. S. 32, 83 L. Ed. 26.)

Now all that Rule 12(b) accomplished was to make a change in the prevailing *mechanics* for asserting an objection to venue or jurisdiction over the person. Under the old practice an objection to venue or jurisdiction over the person had to be asserted *before* answer, by a motion *limited* to that objection, frequently labelled a "special appearance". But even under the old practice the label "special appearance" was unnecessary because the name or label of the appearance did not matter; rather it was the limited nature of the motion or relief sought, which gave character to the appearance. *Davis* v. *Davis,*

305 U. S. 32, 83 L. Ed. 26. Under the old practice if the defendant asserted an objection to venue or jurisdiction over his person, with his answer, or other motion to the merits, he was deemed to have waived his objection, or "special appearance." The spirit of the New Rules, however, is to preserve such objection or "special appearance", when properly asserted by answer or by motion before answer. Looking at the problem from a procedural standpoint, all that the New Rules did was merely to add another method for asserting such an objection.

But the fact that the New Rules furnished a second method for asserting such an objection, did not destroy the settled *substantive* law of general and special appearances; nor did they take away from the parties the right to appear voluntarily, or waive, or bargain away such an objection, either by actually entering a general appearance, or by entering into a contract or stipulation amounting to a general appearance. True, the New Rules do not mention general or special appearances by name; but for that matter, neither do the Practice Acts in most states of the United States. The substantive law relating to general and special appearances, like the substantive law of a "fee simple" is still part of our fundamental law.

That the New Rules did not destroy the substantive law relating to general and special appearances was held by the Fifth Circuit Court of Appeals in *Carter* v. *Powell*, 104 Fed. 2d 428, reh. denied 104 Fed. 2d 1012; certiorari denied 308 U. S. 611, 84 L. Ed. 511, and was again recognized by this Court, in *Freeman* v. *Bee Machine Co., supra.*

Now since the law of general and special appearances is still with us, and has not been changed by the New Rules, it follows that where a party has once entered a voluntary or general appearance, he has thus cut the bridges behind him and cannot retrace his steps. To put it in another way, once he enters the Court, he has closed the door behind him and submits to the jurisdiction of the Court over his person. Now since the fundamental

law of appearances has not been changed by the New Rules, the decisions before the New Rules (*Jones* v. *Andrews*, 10 Wall. (U. S. 327, 19 L. Ed. 935; *Placek* v. *American Life Ins. Co., supra; Brookings State Bank* v. *Federal Reserve Bank, supra*), are applicable. If before the New Rules a voluntary or general appearance operated to waive objections to the jurisdiction over the person, the same rule applies now and the respondents have waived any objections to jurisdiction over their persons.

POINT IV

The Court below erred in deciding the second appeal on the ground of lack of jurisdiction over the person, which ground was not raised or urged by the parties either before it or the District Court below.

It is fundamental that an Appellate Court will not consider or decide questions which are not raised before it, or which are not raised below; yet here that is precisely what the Circuit Court of Appeals did. Despite the fact that the parties, and the two District Judges below, have at all times treated the question as one of venue, and despite the fact that the decision of the Circuit Court of Appeals on the first appeal was rested upon that premise, yet, on the second appeal, it departed from that theory of the case, and from its own former decision, which was the law of the case, and decided the appeal on a point neither raised nor argued before it nor before the court below.[1]

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1. The respondents in their Appellees' Brief before the Circuit Court on the second appeal, gave the following statement of the questions involved on the appeal.

"STATEMENT OF QUESTIONS INVOLVED

1. Under the opinion and mandate of this Court on the former appeal (130 F. 2nd 185) did the District Court (the stipulations having been declared void) not have the power under the Rules of Federal Procedure and especially Rule 60 (b), to extend the individual defendant's time to move with respect to the complaint and then to entertain and grant their motion to dismiss the complaint because of improper *venue?*"

Such a departure from established principles of appellate law should be supervised by this Court.

In *Letulle* v. *Scofield*, 308 U. S. 415, 84 L. Ed. 355, this Court granted certiorari to review a decision of a Circuit Court of Appeals, which had decided a case on a point not raised or litigated by the parties. To the same effect see *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200; 80 L. Ed. 154.

POINT V

The Court below erred in deciding the second appeal on the ground of lack of jurisdiction over the respondents' persons, since that ground, if any, was waived by the respondents.

The Circuit Court of Appeals seems to have felt constrained to "treat the motion * * * as raising the defense of lack of jurisdiction over the person" (Supp. App. 6) despite the fact that "Both in the District Court and upon appeal the parties treated the motion only as raising the defense of improper venue" (Supp. App. 4, 5).

We respectfully submit that there was not such constraint upon the Circuit Court of Appeals. We think it was error for them to have changed the theory of respondents' objection from venue (upon which the parties and the District Judges, and the Circuit Court of Appeals had proceeded throughout the litigation), to one of lack of jurisdiction over their person.

Assuming that the respondents had objections to improper venue and lack of jurisdiction over the person, their failure to assert the latter, operated as a waiver under Rule 12 (b), (g), (h) of the Rules of Civil Procedure, *Carter* v. *Powell, supra; cf. Nakdimen* v. *Baker*, 111 Fed. 2d 778, 782 (C. C. A., 8th). Hence there was no constraint upon the Circuit Court of Appeals to raise and decide the question of alleged lack of jurisdiction over the person.

POINT VI

The Court below erred in holding that the respondents, notwithstanding their appearance, could assert the objection of lack of jurisdiction over them, even after their time to answer had expired.

The Circuit Court of Appeals concedes that the respondents lost their objection to venue, because they did not assert it before their time to answer expired (Supp. App. 4). They hold, however, that this reasoning does not apply to the objection of lack of jurisdiction over their persons, even though they entered a general appearance in the case.

We respectfully submit that the distinction drawn by the Court is artificial, impractical and contrary to the spirit of Rule 12(b) and (h) of the Rules of Civil Procedure. Here, both objections arise out of the same operative facts; both relate to the convenience of litigants, and as such are personal privileges which the respondents may waive. Even before the adoption of the Rules of Civil Procedure, the decisions of this Court and other Circuits treated both types of objections alike and as one and the same. *Cf. Blank* v. *Bitker*, 135 Fed. 2d 962 (C. C. A., 7th) with *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 1000; *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 510, 54 L. Ed. 300, 304; *Seaboard Rice Milling Co.* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633, 634; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167.

The conflict in these cases should be settled by this Court.

Conclusion

This case involves one of the most troublesome questions in the administration of the anti-trust laws. There is hardly an anti-trust case in which the question of venue or lack of jurisdiction over the person is not raised. Litigation over these questions causes great delay. In the

case at bar, this phase of the litigation has consumed three years, during which time the trial of the case has been delayed.

Apart from these questions, and the applicability thereto of the Rules of Civil Procedure, which should be put at rest by this Court, a more serious issue in the case concerns the stability of the judgments of our Circuit Courts of Appeal.

Our entire appellate system rests upon the concept that a decision of an Appellate Court of competent jurisdiction constitutes the law of the case, which the lower court must obey; that if it fails to abide by the superior judgment, the Appellate Court will compel obedience to its mandate; and that once an Appellate Court has spoken and remanded the cause, it may not change that result, even though it may be erroneous, particularly after the expiration of the term. It is upon the faith of these well established rules of judicial decision that the public relies in seeking relief in the courts.

We respectfully submit that in the case at bar these fundamental rules of judicial decision have been departed from, in that the Circuit Court of Appeals has denied enforcement to petitioner's rights which were adjudicated on the first appeal, and thus the petitioner has ended up with a pyrrhic victory.

We therefore respectfully urge that a Writ of Certiorari be granted in this case to review and correct the judgment of the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

ISRAEL B. GREENE,
Of Counsel with Petitioner.